Filed 10/14/04; pub. order 11/9/04 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WESTSIDE CONCRETE COMPANY, INC., Plaintiff and Appellant, v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT, et al., Defendants and Respondents.	B167037 (Los Angeles County Super. Ct. No. BC286838)

APPEAL from an order of dismissal of the Los Angeles County Superior Court, Ralph W. Dau, Judge. Reversed in part, and affirmed in part.

Atkinson, Andelson, Loya, Ruud & Romo, Steven D. Atkinson, Robert R. Roginson and Christopher S. Milligan, for Plaintiff and Appellant.

Miles E. Locker, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, for Defendant and Respondent Division of Labor Standards Enforcement, Department of Industrial Relations, State of California.

Bill Lockyer, Attorney General, Randall P. Borcherding, Supervising Deputy Attorney General, Marguerite C. Stricklin, Deputy Attorney General, for Defendant and Respondent Industrial Welfare Commission.

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A plaintiff seeks judicial declarations that one state agency acted in excess of its statutory rulemaking authority, and that a second administrative agency exceeded its

authority by promulgating penalties for labor violations. As to the first contention, we conclude the trial court erred in sustaining the agencies' demurrers without leave to amend because factual disputes preclude resolution of the claims as a matter of law. However, because legislative enactments have mooted the issue as to the second agency's authority to promulgate remedies, a judicial determination on the issue would have been advisory, and dismissal was therefore appropriate.

HISTORICAL, FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and appellant Westside Concrete Company, Inc. (Westside) appeals from an order dismissing this action after the trial court sustained without leave to amend demurrers to Westside's initial complaint. Under well-settled law, we take as true all properly pleaded material factual allegations, and consider those matters which may be judicially noticed. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579 (*Morillion*); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Defendant and respondent Division of Labor Standards Enforcement (DLSE) is the California state agency which administers and enforces regulations issued by defendant and respondent Industrial Welfare Commission (IWC).[1] Defendant and respondent Arthur Lujan is the Chief of the DLSE, sued in his official capacity. The IWC regulates the wages, hours and working conditions for employees throughout the state. Toward that end, IWC promulgates Wage Orders, including Wage Order 1-2001 (Wage Order 1, found at Cal. Code Regs., tit. 8, § 11010) at issue.

The meal period provisions of Wage Order 1 and its predecessors have remained substantially unchanged since 1947. (*California Manufacturers Assn. v. IWC* (1980) 109 Cal.App.3d 95, 114.) Under those provisions, certain non-exempt employees are entitled

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[1] IWC is the state agency charged with the responsibility to formulate regulations (wage orders) governing employment in California. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562 (*Tidewater*), citing Lab. Code, §§ 1173, 1178.5, 1182.) DLSE is empowered to enforce California's labor laws, including IWC wage orders. (*Tidewater, supra,* at pp. 561-562, citing Lab. Code, §§ 21, 61, 95, 98-98.7, 1193.5.)

to work-free meal breaks of at least 30 minutes each, depending on the number of hours worked. In June 2000, in accordance with a legislatively mandated review and following public hearings, the IWC concluded the meal period provisions were "toothless" and no incentive was provided for employers to ensure employees received the meal periods to which they were entitled.[2] At that time, the only remedy available to an employee wrongfully denied uninterrupted 30-minute meal periods was to obtain an injunction against the employer ordering the employer to "give them." To provide employers an incentive to comply with the meal period provisions, the IWC adopted a proposal which required employers to pay employees one hour's pay for each day on which the employee did not receive a meal period in accordance with IWC regulations. (See IWC's "Statement as to the Basis [for Wage Order 1]," at pp. 19-20.) That proposal, which became effective in October 2000, was incorporated in Wage Order 1 which provides, in pertinent part:

"11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

[¶] . . . [¶]

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. *An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of*

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[2] The review was mandated by Assembly Bill 60, the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" (stats. 1999, ch. 134, codified at Labor Code section 500 et seq., and commonly referred to as "AB 60"). (See Lab. Code, §§ 515, subd. (a), 517, subd. (a).)

all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided." (Wage Order 1, 8 Cal. Code Regs. § 11010, emphasis added.)

Westside's business operations include the delivery of pre-mixed (ready-mix) concrete to construction sites throughout Southern California. It employs drivers for this purpose. To ensure the concrete they deliver remains homogenous and at the proper consistency and temperature, drivers must operate their trucks continuously, and cannot permit the mix to remain in the truck for too long. In addition, the timing of job deliveries, most of which require multiple truck loads of concrete, is critically important. If a break of any length occurs between the delivery of truck loads, there is a risk the individual loads of concrete will not bond with one another, thereby potentially compromising the structural integrity and safety of the final product. For these reasons and others, Westside claims it is not possible for ready-mix drivers to stop their trucks and leave them unattended for uninterrupted 30-minute off-duty meal periods.

As soon as concrete is poured, the driver immediately returns to the "batch" plant to clean out the residual concrete from the truck and pick up another load, so that no interruption is caused in the delivery or placement of concrete. Because the truck "drum" (place in which concrete is held) must turn constantly, it is essential for safety reasons that the driver watch the truck at all times. In addition, because of the continuous nature of concrete pours, it also is not ordinarily possible for drivers to stop and leave their trucks unattended at the plant for 30 minutes before picking up another load and heading out again. Instead, drivers historically have taken their breaks "on the fly," and eaten their meals during idle stand-by time at construction sites, or while waiting for their trucks to be reloaded at the plant.

In a letter issued in April 2001, DLSE responded to an inquiry opining that "[r]eady-mix drivers . . . are covered by Wage Order 1." As a result, the meal period provisions of that Order, including the requirement for an uninterrupted duty-free meal break of at least 30 minutes per workday, "would apply to the ready-mixed drivers in question." That letter contains an important footnote which states:

> "Of course, to the extent that a meal break cannot be provided during a workday because 'the nature of the work prevents the employee from being relieved of all duty,' and the employee has previously signed a voluntary authorization for an on-duty meal period that comports with the requirements of the IWC order, the employer is not liable for the penalty pay. In situations where the product would be damaged or destroyed if the employee takes an off-duty meal period, the existence of a voluntary written authorization would therefore permit an on-duty meal period. For example, the nature of the work would probably prevent an off-duty meal period during a cement pour, if the services of the driver are needed during the pour." (Original emphasis deleted.)

Apparently, this footnote generated a number of inquiries to DLSE from numerous "employers and union officials seeking further guidance on the issue of whether the nature of the work will allow for an on-duty meal period."

In response to those questions, on June 14, 2001, Lujan and DLSE's chief counsel, Miles Locker, went on-site to personally observe "various cement 'batch plant' operations," to determine whether the nature of the work performed by ready-mix drivers prevented them from being relieved of all their duties in order to take uninterrupted 30-minute meal periods. Based on that day's observations, DLSE issued another letter in December 2001. In that letter, DLSE stated that the "nature of the work" exception to the meal period requirement, which permits employers to require employees to take on-duty meal periods, applies only in cases in which a product will be lost or destroyed if the employee takes an off-duty meal period. DLSE concluded it was "inappropriate to conclude that ready-mixed drivers can never, or can always, meet the prerequisites for a lawful on-duty meal period." As to "this particular occupation (ready-mix drivers),"

DLSE stated the determination whether the prerequisites for a lawful on-duty meal periods could be satisfied, "can only be made on a case by case, and day by day basis. . . ." Westside alleges that, in June 2002, Lujan informed participants in a meeting "that, *in most instances,* a ready-mix driver can take an off duty meal period." (Original emphasis.) Westside strongly believes otherwise.

Westside initiated this action for declaratory and injunctive relief in December 2002. It alleged an actual controversy had arisen between it, on the one hand, and DLSE and IWC, on the other, as to the interpretation of the meal period provisions of Wage Order 1, as applied to the ready-mix industry. Westside's complaint is premised on four legal theories: (1) DLSE's April and December 2001 opinion letters regarding the "nature of the work" exception to the off-duty meal period provisions for ready-mix drivers are invalid "underground" regulations adopted in violation of section 11340.5, subdivision (a) of the Administrative Procedure Act (APA) (Government Code section 11340, et seq.); (2) The DLSE's interpretation of the meal period provisions, as applied to the ready-mix industry, is arbitrary and capricious; (3) The term "nature of the work," as employed by respondents, is unconstitutionally vague, in that it fails to give ready-mix employers proper notice as to when they may require drivers to take on-duty meal periods; and (4) IWC exceeded its statutory authority in adopting and promulgating the "penalty" provision of section 11, subd. (D) of Wage Order 1 (requiring an extra hour's pay for each day on which an employee is not provided an off-duty meal period). (Gov. Code, § 11145.)

Westside sought judicial declarations that (1) DLSE's interpretation of the meal period provisions of Wage Order 1, as applied to Westside and its industry, was invalid and unenforceable; (2) the nature of the work in the ready-mix industry prevents drivers from taking off-duty meal periods; and (3) IWC exceeded its regulatory authority in promulgating section 11, subdivision (D) of Wage Order 1.

DLSE and IWC filed general demurrers asserting that the complaint did not state and could not be amended to state a viable claim.

The trial court found the April and December 2001 letters from DLSE's general counsel were "advice letters to a private party," not "administrative regulation[s]" subject to the APA. It also found the "IWC had authority to promulgate the meal period provisions of its wage orders . . . ." The court refused Westside's request for leave to amend, sustained the demurrers and dismissed the action. This appeal followed.

DISCUSSION

The principal issue on appeal is whether the court erred in sustaining respondents' demurrers without leave to amend to Westside's complaint for declaratory relief. For reasons discussed below, we conclude the court erred in sustaining the demurrers without leave to amend as to the question whether DLSE has adopted "underground regulations" in violation of the APA. However, because legislative enactments have rendered the issue of the IWC's authority to promulgate penalties for violation of the meal period provisions moot, dismissal of that claim was appropriate.

As a matter of law, a demurrer admits the truth of all material factual allegations of the complaint. (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722.) "If those facts reveal an actual controversy exists between the parties, the complaint is legally sufficient for declaratory relief." (*Ibid*.) Sustaining a demurrer when the complaint reveals, or with proper amendment could reveal, the existence of any justiciable controversy. (*Ibid*.) If the pleading requirements are satisfied, a complaint is legally sufficient, irrespective of the trial court's view that plaintiff ultimately will be unable to prove the claims asserted. (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 602; see also 5 Witkin, Cal. Proc. (4th ed. 1997), Pleading, § 831, pp. 288-290, and multiple authorities cited therein.) "Declaratory relief is appropriate to obtain judicial clarification of the parties' rights and obligations under applicable law." (*Californians for Native Salmon Etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1427.) If "'a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; . . . if it does enter a dismissal, it

will be directed by an appellate tribunal to entertain the action. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged.' [Citations.] 'Any doubt should be resolved in favor of granting declaratory relief.' [Citation.]" (*Id.* at pp. 1426-1427.)

1. The existence of a factual dispute as to the status and validity of DLSE's administrative pronouncements precludes summary disposition on Westside's initial pleading.

Westside contends the DLSE's April and December 2001 letters interpreting Wage Order 1's meal period provisions are "underground regulations" intended to apply to the entire ready-mix industry, and were adopted in violation of the APA. Respondents insist they are merely "opinion letters," not subject to the rulemaking provisions of the APA. The mere restatement of the parties' respective positions on this issue illustrates the presence of a factual dispute inappropriate for resolution on demurrer.

To further its primary function of enforcing the state's labor laws, DLSE is vested with the authority to promulgate necessary "regulations and rules of practice and procedure." (Lab. Code, § 98.8.) In adopting and enforcing such regulations, however, DLSE is subject to the requirements of the APA. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 25.)

The APA establishes the rulemaking procedures which bind state agencies. Specifically, the agency is required to: "give the public notice of its proposed regulatory action . . . issue a complete text of the proposed regulation [together] with a statement of the reasons for it . . . give interested parties an opportunity to comment on the proposed regulation . . . respond in writing to public comments . . . and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law . . . which reviews the regulation for consistency with the law, clarity, and necessity . . . ." (*Tidewater, supra,* 14 Cal.4th at p. 568, statutory citations omitted.)

A primary "purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation . . . as well as notice of the law's

requirements so that they can conform their conduct accordingly . . . . The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny." (*Tidewater, supra,* 14 Cal.4th at pp. 568-569, citations omitted.)

The "regulations" subject to the APA are broadly defined to include "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) Regulations subject to the APA have two principal identifying characteristics: "First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.'" (*Tidewater, supra,* 14 Cal.4th at p. 571, statutory citation omitted.) The validity of an administrative regulation is a proper subject of an action for declaratory relief. (Gov. Code, § 11350, subd. (a), Code Civ. Proc., § 1060.)

On the other hand, agencies remain free to "provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. [Citation.] Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. . . . A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes." (*Tidewater, supra,* 14 Cal.4th at p. 571, statutory citations omitted; see

also *Morillion, supra,* 22 Cal.4th at p. 584 [DLSE opinion or "advice letters are not subject to the rulemaking provisions of the APA."].)

Westside contends a factual dispute exists as to whether the DLSE's 2001 opinion letters were intended by the agency to be of general application as to the applicability of the off-duty meal period requirements to the statewide ready-mix industry. We agree, and conclude the trial court improperly resolved that factual dispute on demurrer by finding, on insufficient facts and in contradiction to allegations it was bound to accept as true, that DLSE's letters are, as a matter of law, "advice letters to a private party . . . not subject to the [APA]."

The sparse record does not indicate that the DLSE's letters are mere summaries of its prior decisions or restatements of its prior positions in specific cases, which would render the letters exempt from the APA. Indeed, broad language in the letters implies a contrary conclusion, i.e., that the agency's interpretation of Wage Order 1's meal period provisions is intended to apply statewide. Specifically, the April 2001 letter responds to an inquiry about the applicability of Wage Order 1's meal and rest period requirements "to ready-mix drivers," covered by collective bargaining agreements, "who deliver product from the cement plant to the purchaser's jobsite." The response does not single out any particular portion of the statewide industry, does not apply established law to a specific factual circumstance, and is not clearly directed to a specific business entity.[3] In addition, the letter's reference to the terms and requirements of AB 60, enacted in 1999, and IWC's adoption of certain "new" requirements governing meal periods, militates against a conclusion that the letter merely restates DLSE's longstanding views.[4]

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[3] The letter is addressed to and responds to a November 2000 letter from Richard D. Prochazka, whose affiliation is unknown. Prochazka's letter to DLSE is not part of the record.

[4] By contrast, the same letter refers to and reiterates that DLSE's "long-standing enforcement policy," requiring employers to give employees rest breaks of at least 10 minutes, would preclude employers of ready-mix drivers from continuing the industry-wide tradition of having drivers take multiple breaks of five minutes or less "on the fly"

Finally, given that the meal period provisions of Wage Order 1 only received "teeth" in Fall 2000, the letter's reference to employer liability for "the meal period penalty" for all employees not afforded required meal breaks also supports Westside's contention that the letter states new policy, intended to apply broadly to all or most of an industry. Similarly, reasonable inferences may be drawn that the pronouncements in DLSE's December 2001 letter, issued in response to questions raised by numerous employers and union officials about the earlier letter and the effect of the new meal period penalties, also were akin to underground regulations and intended to have general, industry-wide application. That letter, written again by Locker, restates the views articulated in his April letter and says that "nothing observed [his and Lujan's on-site observations had] cause[d DLSE] to question the analysis set forth in the April 2, 2001 letter." Locker repeated DLSE's position that it simply cannot be said that "ready-mix drivers can never, or can always, meet the prerequisites for a lawful on-duty meal period." That letter, like its predecessor, was distributed to IWC and all of DLSE's attorneys. "A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law." (*Tidewater, supra,* 14 Cal.4th at pp. 574-575 [disapproving *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, wrongly concluding that DLSE's interpretation of a Wage Order, applied generally to a class of similar cases, and which did not merely restate or summarize the DLSE's prior decisions or advice letters, was not a regulation within the meaning of the APA.].)

This dispute is pivotal. Westside insists DLSE has created a policy of general application to an entire industry, based on incomplete information and without affording parties directly affected by that policy notice or an opportunity to comment on DLSE's conclusions, or the consequences of those conclusions. It remains to be seen whether this

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throughout the day, as business permits. As to this portion of the letter, DLSE's contention that the letter is merely an opinion letter would appear to be correct.

is the case. Regardless, Westside has been improperly denied an opportunity to develop these allegations and to attempt to demonstrate DLSE engaged in unlawful rulemaking in violation of the APA, and is using or intends to use the opinion letters at issue as part of a general enforcement policy regarding the narrow circumstances in which employers might satisfy the criteria to justify requiring their employees to take on-duty meal periods under Wage Order 1.[5] For this reason alone, it was error to sustain the general demurrers without leave to amend.[6]

2. The question of whether IWC's adoption of the meal period penalty was an act in excess of its authority is moot.

Westside alleges IWC acted in excess of its regulatory authority in adopting a one-hour's pay penalty for violation of the meal period provisions of Wage Order 1. DLSE and IWC contend this claim fails as a matter of law because IWC's adoption of section 11, subdivision (D): (1) was not a "penalty" per se, but merely an attempt to provide

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[5] Even DLSE's contention that there is no policy of general application because the applicability of the on-duty meal period exemption must be made on a case-by-case, day-by-day basis implies a policy intended to have general, industry-wide application.

[6] Our conclusion renders it unnecessary to address Westside's remaining contentions that DLSE's interpretation of the meal period provisions of Wage Order 1 is arbitrary or capricious, and that the term "nature of the work," as employed, is unconstitutionally vague. Resolution of those issues hinges on an initial determination as to the status and validity of DLSE's interpretation: If, after further proceedings, DLSE is found to have violated the APA, those underground regulations, as well as the interpretations contained therein, will be invalid. (Gov. Code, §§ 11340, 11350, subd. (a); *Masonite Corp. v. Superior Court* (1994) 25 Cal.App.4th 1045, 1053-1054; *Tidewater, supra,* 14 Cal.4th at pp. 576-577 [interpretation contained in void administrative regulation is entitled to no judicial deference].) If no such violation is found, the trial court will at least be in a better informed factual position to issue the appropriate declaration.

employers an incentive to comply with the meal period provisions and avoid the necessity to pay this "premium;" (2) was lawfully adopted under its quasi-legislative authority; (3) was a valid interpretation and extension of certain provisions of the Labor Code; and (4) was subsequently endorsed by the Legislature and is no longer at issue.

The final point is persuasive. The issue is moot. Since January 2001, Wage Order 1's requirement for an extra hour's pay for each day when employees are not afforded uninterrupted 30-minute meal periods has been enforced pursuant to Labor Code section 226.7, subd. (b). Westside has not alleged, and does not claim it could amend to allege, that it was ever threatened with or subjected to enforcement of the IWC's penalty for violation of Wage Order 1's meal period provisions during the three months in 2000 when that administrative penalty was in effect (and presumably enforced or enforceable by DLSE), but had not yet been endorsed by the Legislature. Irrespective of the IWC's authority to promulgate the meal period provision penalty, the Legislature has now spoken and made its position very clear: employees entitled under IWC Wage Orders to uninterrupted meal and rest periods must be afforded those breaks; employers who fail to provide them do so at their financial peril.

DISPOSITION

The order sustaining, without leave to amend, the demurrers of DLSE and IWC is affirmed only to the extent the complaint raises the now-moot issue of the IWC's

authority to promulgate a penalty for violation of Wage Order 1. In all other respects, the order is reversed. Each party shall bear its own costs on appeal.

BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WESTSIDE CONCRETE COMPANY, INC., Plaintiff and Appellant, v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT, et al., Defendants and Respondents.	B167037 (Los Angeles County Super. Ct. No. BC286838) ORDER CERTIFYING PUBLICATION

THE COURT*:

IT IS HEREBY ORDERED that the opinion filed in the above-entitled matter on October 14, 2004, is certified for publication with no change in the judgment.

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* RUBIN, Acting P. J., BOLAND, J.